Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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No. 73-1721

ABETTA ELECTRIC SERVICE CORP.,
Petitioner,

against

LOUIS L. LEVINE, as Industrial Commissioner of the State of New York,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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Opinion Below

The decision after a hearing of the respondent is found at Petition (p. 16a), after a Report by the Hearing Officer (4a).* In the New York courts this case is reported at 42 A.D.2d 1050, 348 N.Y.S. 2d 955 (1st Dept., 1973), where the Appellate Division confirmed the respondent's order without opinion. The Court of Appeals of the State of New York denied a motion for leave to appeal, 34 N.Y.2d 513 (February 20, 1974).

* This was based on an extensive hearing pursuant to statute. Numbers in parentheses refer to Petition's appendix.

Statement of the Case

The petitioner, Abetta Electric Service Corp., brought this proceeding to review a determination by the respondent, the Industrial Commissioner of the State of New York, requiring that $32,158.74 be paid employees on a public work project. The deduction was from the prime contractor, Beacon-Vitanzi. The matter originated on a complaint that petitioner, a subcontractor of Beacon-Vitanzi, had failed to pay the prevailing rate of wage to several of its employees. The latter were working for Abetta on a public work project at Brooklyn State Hospital, Brooklyn, N. Y. for the State Health and Mental Hygiene Facilities corporation.

State law, Labor Law, Art-8, required payment of the prevailing rate of wage on all public works projects.* The petitioner was doing electrical work on such project.

So far as relevant apprentice electricians were hired for the project in a ratio exceeding the program allowances. N. Y. Labor Law § 220, subd. 3-e. Where the program required three journeymen for each apprentice (Local Union 363 program), Abetta used approximately one journeyman for each apprentice. A necessary result was much lower wages for the workmen and labor costs on the project. An investigation was made by the State, charges filed and a hearing held on some $32,000 in underpayments of wages and supplements.

The hearing officer ruled on several legal objections, none of them of a constitutional nature. None others were presented. Thus he found the rate of a journeyman electrician to be $7.75 per hour in wages and $2.01 per hour in supplements, rather than a lower "M" or modification

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* The Government has a similar statute and requirement, 40 U.S.C. § 276a.

rate argued for by Abetta. The work done was found to be that of a journeyman electrician. It was also determined that the penalty for excessive apprentices on a public work project would be the payment of the journeyman's rate for those apprentices (10a). The respondent confirmed the recommendation and award (16a).

Thereafter petitioner instituted a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR) to review the determination. The Appellate Division, to which the procedure had been transferred, confirmed the determination (no opinion). After the Appellate Division denied leave to appeal, a motion for leave to appeal directed to the Court of Appeals was also denied.*

At this point, since all appeals had been exhausted, the respondent released the moneys withheld and paid them to the individuals involved. Thus the matter is moot and petitioner never moved for a stay in the courts below or this Court.

Reasons for Denying Certiorari

A. The petition raises issues that were never before the Courts below.

The petitioner alleges it raised constitutional issues in his amended petition and reply (Pet. p. 8). However it never raised them in the administrative proceeding before the respondent. Under New York practice, an objection on constitutional grounds must be raised at the administrative hearing or the objection is not available. *Matter of Leogrande* v. *State Liquor Authority*, 19 N.Y.2d 418, 424, 280 N.Y.S. 2d 381, 227 N.E. 2d 302 (1967). Thus it is clear where the hearing officer had no constitutional claim

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* It should be noted that an appeal to the Court of Appeals lies as of right when a constitutional issue is presented. CPLR 5601(b).

before him, the state court did not either. The Supreme Court cannot review an issue not properly raised below.

The petition here fails to state what "constitutional questions" were purportedly raised below. Actually the argument in the brief herein is entirely different from the argument below, as to violation of the federal anti-trust policy. From the papers petitioner now presents it is obvious that the alleged "constitutional" issues were afterthoughts, raised not at the hearing or the original Article 78 petition. The petition herein contains additional afterthoughts.

Finally the petitioner moved for permission to appeal, CPLR 5602, presumably because it was seeking to appeal from an order of the Appellate Division, which was not appealable as of right. 5602(a)(1)(i). As such the motion for leave to appeal was directed to the Court of Appeals' discretion. If there really was a constitutional issue, or so petitioner thought, it could have appealed to the Court of Appeals, as of right, CPLR 5601(b)(1). Failure to take an appeal as of right indicates the lack of any constitutional issue in this matter. If the petitioner wanted to preserve or show that a constitutional issue was raised the normal method is to move to amend the remittitur. *Cf. McKay* v. *Stewart,* 29 N.Y. 2d 746 (1971), *cert. denied,* 405 U.S. 1040 *sub nom. Cecire* v. *Stewart.*

B. No substantial constitutional issue is presented.

Assuming, *arguendo,* there was some constitutional issue properly presented below, the petitioner fails to present any substantial constitutional issue worthy of consideration by this Court.

Petitioner was a sub-contractor on a public works project. As such it was required to pay the prevailing rate of wages to workers on the project. New York Labor Law, Article 8, § 220 *et seq.* It was not required to pay

such wages on other work it performed. Thus petitioner's discussion of illegal restraints of trade, Br. pp. 9-11, is woefully besides the point. Cases involving union contracts purporting to bind outside employers in the conduct of their business have nothing to do with public works contracts. Contrary to *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1935), this Court in *United States* v. *Darby*, 312 U.S. 100, 123 (1941), upheld the Fair Labor Standards Act of 1938 and limited *Carter*. *Darby* recognized the government's right to suppress production of goods under substandard labor conditions. In essence petitioner herein asked to be freed from provisions of state law while still retaining the benefits of doing public work. In short, it seeks to unfairly compete on said project. Of course, this is wrong. If petitioner can use low-cost labor on public work without penalty, it obtains an unfair competitive advantage.

Claimed lack of notice of the allowable apprentice ratio (Br. p. 9) is irrelevant because the contractor (Beacon-Vitanzi) was bound and never appeared to contest this. Use of subcontractors can be a strategem to evade the law. Actually the money involved here was withheld from the contractor, not the subcontractor. As the hearing officer (8a) said, "(t)he general contractor under Section 223 of the Public Work (sic.—actually 'Labor') Law is held to a standard of strict liability for any dereliction on the part of the subcontractor."

The petitioner ignores the valid purpose of the statute which had been summed up as follows:

> "The present statute is an attempt by the State to hold its territorial subdivisions [and itself] to a standard of social justice in dealing with laborers, workmen and mechanics. It is to be interpreted with a degree of liberality essential to the attainment of the end in view." *Austin* v. *City of New York*, 258 N.Y. 113, 117, 179 N.E. 313 (1932), per CARDOZO, J.

And similarly, see *Bucci* v. *Village of Port Chester*, 22 N.Y. 2d 195, 201, 292 N.Y.S. 2d 393 (1968).

In requiring registration of apprentices when used on public work, the statute § 220, subd. 3-e, furthers the purpose of paying a prevailing wage. As the hearing officer said (10a):

> "Finally, the requirement of limiting the apprentices was to insure that excessive apprentices were not used in public work since such apprentices could operate to reduce illegally, the number of journeymen on a public work job and also could give an unfair competitive advantage in labor costs to those contractors who avoid adherence to the ratio and an unfair competitive disadvantage to those contractors who abide by the apprentice ratio agreements. It has been the overall purpose of the Public Work Law to provide through wage schedules and apprentice ratios that all contractors shall bid on a public work job on an equal basis with respect to labor costs. If there was no penalty for the violations of the apprentice ratio there would be no purpose of including the ratio provisions in Section 220, subd. 3-e. Or, indeed, in the agreements themselves."

The subcontractor here, the petitioner was in total nonconformity with the statute. The ratio, 1 to 3, was part of the "prevailing rate of wage" since nonadherence lowered the wage scale. The apprentices employed were registered with a program requiring such a ratio. Indeed no other ratio was ever suggested.

Finally petitioner never furnished "written evidence of the registration of *his* program and apprentices as well as the appropriate ratio and wage rates, for the area of construction prior to using any apprentices on the contract work." Last sentence of Labor Law, § 220, subd. 3-e

(emphasis supplied). Absent such compliance no apprentice labor was properly used on the job. There obviously has to be some penalty and payment of journeyman wages for the work, ruled to be that of a journeyman electrician, was proper.

C. There is an independent, adequate state ground to deny certiorari.

In view of petitioner's failure to conform to § 220, subd. 3-e, as noted *supra*, it could not use apprentices on the *public* work, regardless of whether there is a constitutional issue on notice of the appropriate ratio. Failure to comply with the statute in any way is an independent, adequate state ground. This Court will not review state court judgments which rest upon independent, adequate state grounds, even where those judgments also decide federal questions. *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194, 198 (1965); *Henry* v. *Mississippi*, 379 U.S. 443, 446 (1965); *Jankovich* v. *Toll Road Commission*, 379 U.S. 487, 489 (1965).

The issues in this case were simply the rate of pay and the sanction for failure to properly pay apprentices. The respondent found that the petitioner had failed to pay its employees properly. Simple justice demanded that sufficient money be deducted from the contractor's* payments to provide the workers with their due.

The petitioner continues to argue, even before this Court, substantiality of the evidence and interpretation of state statutes. These arguments have no merit and are not cognizable here.

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* The petitioner claims the contractor joins in the petition for certiorari (Br. p. 18). Of course this is nonsense since it was not a party below or even now listed as petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, June 7, 1974.

Respectfully submitted,

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